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Before the
Federal Communications Commission

Washington, D.C. 20554

In the Matter of) MM Docket No. 93-203
)
Amendment of Section 73.202(b),) RM-8245
Table of Allotments,) RM-8340
FM Broadcast Stations,)
(Isleboro and Winter Harbor, Maine))

To: Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

PETITION FOR RECONSIDERATION

Christopher DiPaola ("DiPaola"), by and through counsel, and pursuant to §1.429 of the Commission's Rules (47 C.F.R. §1.429), hereby submits his "Petition For Reconsideration" of the Order, DA 94-1270, released November 23, 1994,¹ ("Order"), in the above-captioned rulemaking proceeding.² In support whereof, the following is shown:

Background

1. On December 30, 1993, the Commission issued a Report and Order, DA 93-1495, in MM Docket No. 93-203 ("Report and Order"), wherein they allotted a new FM station on Channel 288B1 to Isleboro, Maine. In the Report and Order, the

¹ The caption of the Order included other rulemaking proceedings all of which involve the opening of windows for new FM stations. However, DiPaola's appeal is limited to the Commission's action with respect to MM Docket No. 93-203.

² DiPaola is simultaneously filing a Motion to stay the effectiveness of the Commission's Order pending resolution of the instant Petition.

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Commission opened a window for the filing of applications beginning on February 15, 1994, and ending on March 17, 1994.

2. On February 25, 1994, the Commission issued a Public Notice, FCC 94-41 ("February 25th Public Notice"), "holding in abeyance the processing of applications and the adjudication of hearing proceedings involving mutually exclusive proposals for new broadcast facilities in light of the opinion of the United States Court of Appeals for the District of Columbia in Bechtel v. FCC, 10 F. 3d 875 (D.C. Cir. 1993)." The Commission stated that, since the Court had invalidated its method for selecting between mutually exclusive broadcast applications, it was freezing all broadcast hearings and the processing of applications for new stations. The Commission added that "...during the freeze, the Mass Media Bureau will not issue cutoff lists or adopt FM filing windows for new filing opportunities....[A]ny such cutoff lists or orders adopted prior to the imposition of this freeze will be suspended for the period of the freeze." The February 25th Public Notice did not specifically state that window filing periods that had been opened prior to the imposition of the freeze were to be cancelled or postponed or that such windows would remain open. Nor did the Mass Media Bureau ever issue an order suspending the Isleboro window period, which had been open for ten days. The February 25th Public Notice was never published in the Federal Register.

3. On March 16, 1994, Mr. DiPaola filed an application for the new Isleboro FM station. The application is currently pending in the Mass Media Bureau FM processing line.

Statement of Interest

4. Since Mr. DiPaola filed an application during the Isleboro window filing period (File No. BPH-940316MD), his interest in this case is obvious. Whether the Commission decides to accept additional applications in a second Isleboro window filing period or rescinded its November 23rd Order will directly effect Mr. DiPaola who will be required to defend against additional applications that are filed.

The February 25th Public Notice Was Never Formally Published

5. The Commission never formally published the text of its February 25th Public Notice in the Federal Register and, as such, no formal notice was ever given to the general public of this action and it had no legal effect on any party that would have been adversely affected by it. The Isleboro Report and Order, which provide clear notice of the window filing period, was never rescinded or suspended by the Commission and the Commission cannot now correct this error by opening a second Isleboro window.

6. Section 552(a)(1) of the Administrative Procedure Act states:

...Each agency shall separately state and currently publish in the Federal Register...rules of procedure...substantive rules of general applicability...and each amendment, revision, or repeal of the foregoing. Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published....

5 U.S.C. §552(a)(1)(C)-(E).

7. Clearly, the Commission's action of February 25th, whereby it suspended the FM processing rules which govern the acceptance of applications for new FM stations, was a temporary change to a set of procedural rules that would have required

publication in the Federal Register. See, Kessler v. FCC, 1 RR 2d 2061 (D.C. Cir. 1963)(freeze on filing of AM applications deemed a change in procedural rules requiring publication). Without such publication, the February 25th Public Notice did not prevent the Isleboro window, which had been open for ten days, from continuing to a close.

8. While the Commission may claim that the release of its February 25th Public Notice had the effect of providing actual notice to anyone contemplating an Isleboro filing and that those parties are now foreclosed from raising a "lack-of-publication" argument (see Kessler v. FCC, *supra*), the February 25th Public Notice was not a clear pronouncement that the Commission intended all open window filings to be stayed.

The February 25th Public Notice Did Not Provide Actual Notice That All Pending Window Filing Periods Were Stayed

9. The Commission's February 25th Public Notice, released after the Isleboro window had already opened, did not specifically state that window periods which already been opened and had yet to close were being cancelled or postponed. At best, the February 25th Public Notice provided notice that no new windows would be opened but was silent as to the status of previously announced window periods. Had the Commission meant to suspend all open windows, the language of its February 25th Public Notice should have been clearer. Instead, the Commission issued a Public Notice that failed to specifically suspend the effectiveness of its previous Report and Order in MM Docket Np. 93-165. This created great confusion among the general public and specifically the communications bar.

10. Shortly after the release of the February 25th Public Notice, both undersigned counsel and another communications counsel sought a declaratory ruling from the Commission on the issue of whether open window filing periods had been cancelled or postponed. See Exhibits A and B. Lauren Colby, Esq., a communications attorney, filed an "Emergency Petition For Declaratory Ruling" on March 2, 1994.³ Mr. Colby sought a ruling from the Commission as to whether open windows were still valid or had been cancelled or postponed. In his Emergency Petition, Mr. Colby related that:

A sharp debate has arisen amongst communications counsel concerning the meaning of the [February 25th Public Notice]....There is...broad confusion concerning the meaning of the word 'suspended' as applied to FM windows which have already been announced. Some attorneys contend that applications will be accepted for those windows which have already been announced, but the processing of those applications will be suspended until the freeze lifts. Other attorneys believe that the Commission will not accept any application filed during the currently announced windows, because those windows have somehow been canceled or postponed (although the terms 'canceled' or 'postponed' do not appear in the official announcement).

Members of the FCC staff have given conflicting opinions. Responsible staff members have supported both the view that the Commission will continue to accept applications for windows already announced, and the other point of view that the Commission will reject any such applications.

Exhibit A at p. 2.

11. Mr. Colby stated further that: "It is urgent that this matter be clarified" and that "[I]ssuance of a ruling will be beneficial...to a considerable number of persons, who have commissioned the preparation of applications which were to be

³ Smithwick & Belendiuk, P.C. filed "Comments In Support of Emergency Petition For Declaratory Ruling" on March 2, 1994, raising other questions left unresolved by the Commission's February 25th Public Notice. See Exhibit B.

filed under the windows currently announced, and who have no idea whether to proceed with these applications, or not." Exhibit A. The Commission never acted on Mr. Colby's request or sought to clarify these important matters.

12. While the Commission is not required to make the clearest possible articulation of a proposed action or change in policy, it must, however, be shown that, based upon a fair reading of a Commission order, parties "knew or should have known what the Commission expected of them." McElroy v. FCC, 72 RR 2d 1034, 1038 (D.C. Cir. 1993). The fact that even the Commission's own staff could not discern the true intent behind the February 25th Public Notice is illustrative of the extent of the confusion its release created. In this case, the Commission's February 25th announcement that it was suspending its FM processing line was not made with sufficient clarity to alert potential filers that all open window filing periods that had been previously announced were stayed. Therefore, the Commission's action of February 25th had no such effect and the Commission cannot now reverse its error with a post hoc explanation of what it meant to say.

13. The Commission's present interpretation of the intent of its February 25th Public Notice is not reasonable. The test of whether a Commission interpretation of an earlier pronouncement is valid is whether the pronouncement was "reasonably comprehensible to [people] of good faith." McElroy v. FCC, 72 RR 2d at 1038, citing, Kansas Cities v. FERC, 723 F. 2d 82, 86 (D.C. Cir. 1983). If the Commission's order suffers from a "lack of clarity," and its effect is not clear, the question is then what the parties "'justifiably understood' and whether anything in the order 'made it apparent that the Commission meant otherwise.'" Id, citing, Maxcell

Telecom Plus, Inc. v. FCC, 815 F. 2d 1551, 1558 (D.C. Cir. 1987), quoting, Bamford v. FCC, 535 F. 2d 78, 82 (D.C. Cir. 1975). In this case, the Commission's February 25th Public Notice, suffered from such lack of clarity that its own staff could not decipher its meaning. It was reasonable for Mr. DiPaola, and others, to believe that the Isleboro window, which had already been opened, was still valid and would be the only opportunity for filing applications for the new station. For the Commission to say, in hindsight, that it intended something more when it released its February 25th Public Notice, is an exercise in the "forbidden sin of post hoc rationalizations" that must not be permitted. Reuters Limited v. FCC, 781 F. 2d 946, 951 (D.C. Cir. 1986).

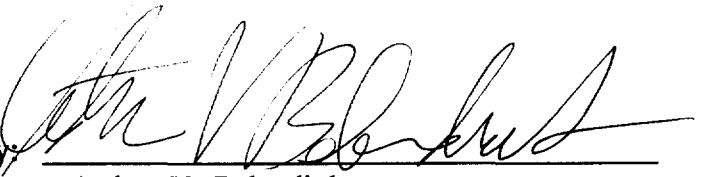
Conclusion

14. In its Report and Order, in MM Docket No. 93-203, the Commission gave specific notice that anyone interested in filing for the new FM station on Channel 288B1 at Isleboro, Maine, do so on or before March 17, 1994. The subsequent release of the Commission's February 25th Public Notice failed to give notice, actual or constructive, that the window filing period had been suspended. DiPaola's counsel and another communications attorney, sought additional guidance from the Commission and received none. Therefore, the sole window filing period has passed and the Commission now has an applicant for the facility. No additional window is necessary or justified in this case.

WHEREFORE, the above-premises considered, Christopher DiPaola, respectfully requests that the Commission's Order, DA 94-1270, released November 23, 1994, be **REVERSED** and **RESCINDED**.

Respectfully submitted,

CHRISTOPHER DIPAOLA

By: 

Arthur V. Belendiuk
Shaun A. Maher

His Attorneys

SMITHWICK & BELENDIUK, P.C.

1990 M Street, N.W.

Suite 510

Washington, DC 20036

(202) 785-2800

December 5, 1994

EXHIBIT A

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
FREEZE ON COMPARATIVE HEARINGS) FCC 94-41
)
TO: General Counsel)
)

EMERGENCY PETITION FOR DECLARATORY RULING

Lauren A. Colby, attorney at law, on behalf of certain clients,¹ hereby respectfully requests the General Counsel to immediately issue a declaratory ruling clarifying certain aspects of the freeze on comparative hearings announced on February 25, 1994, (FCC 94-41). In support thereof, it is alleged:

1. On February 25, 1994, the Commission announced a freeze on comparative hearings. At page 2 of the announcement, the following language appears:

"Further, during the freeze, the Mass Media Bureau will not issue cutoff lists or adopt FM filing windows for new filing opportunities or require the filing of amendments, integration proposals, or hearing fees. . . Any such cutoff lists or orders adopted prior to the imposition of this freeze will be suspended for the period of the freeze".

'It would be inappropriate to identify the clients on whose behalf this petition is being filed, because it would reveal client confidences, i.e., the intention of certain clients to file applications within the window periods which have been announced by the FCC.

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2. A sharp debate has arisen amongst communications counsel concerning the meaning of the above quoted provisions. Most counsel agree that the Commission did not intend to prevent the filing of applications which are in conflict with a renewal application, because the Commission apparently would have no legal authority to do so. Similarly, it would appear that, where a "first come, first served" FM window is open, the freeze would not be applicable, because anyone filing for that window would presumably face no comparative hearing. There is, however, broad confusion concerning the meaning of the word "suspended" as applied to FM windows which have already been announced. Some attorneys contend that applications will be accepted for those windows which have already been announced, but the processing of those applications will be suspended until the freeze lifts. Other attorneys believe that the Commission will not accept any application filed during the currently announced windows, because those windows have somehow been canceled or postponed (although the terms "canceled" or "postponed" do not appear in the official announcement).

3. Members of the FCC staff have given conflicting opinions. Responsible staff members have supported both the view that the Commission will continue to accept applications for windows already announced, and the other point of view that the Commission will reject any such applications.

4. All of this puts the communications bar in a very difficult situation. If we advise clients that all of the pending

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windows have been closed; tell a client not to file an application; and someone else files an application which is accepted, we will have given bad advice. If, on the other hand, we tell a client to file an application and the Commission returns the application and keeps the filing fee, we will have given very bad advice.

5. It is urgent that this matter be clarified. Furthermore, because there are at least two FM windows which are currently open and will be closing within 14 days, it is urgent that the matter be clarified in writing just as soon as possible.

6. The undersigned respectfully requests the General Counsel to issue a further ruling, clarifying these matters. If the General Counsel is unable to do so without consulting with the full Commission, the undersigned respectfully requests that such consultation take place, so that a ruling may be issued. Issuance of a ruling will be beneficial, not only to the communications bar, but also to a considerable number of persons, who have commissioned the preparation of applications which were to be filed under the windows currently announced, and who have no idea whether to proceed with those applications, or not.

Respectfully submitted,

March 2, 1994

LAUREN A. COLBY

Law Office of
LAUREN A. COLBY
10 E. Fourth Street
P.O. Box 113
Frederick, MD 21705-0113

By:

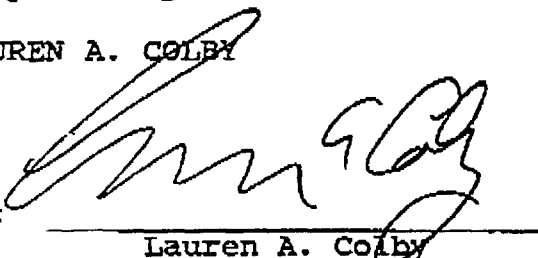

Lauren A. Colby
Attorney

EXHIBIT B

Before the
Federal Communications Commission
Washington, D.C. 20554

On the Matter of)
)
FREEZE ON COMPARATIVE HEARINGS) FCC 94-41
)
TO: General Counsel

**COMMENTS IN SUPPORT OF EMERGENCY PETITION FOR
DECLARATORY RULING**

The law firm of Smithwick & Belendiuk, P.C. ("S&B") hereby respectfully submits its comments in support of the "Emergency Petition For Declaratory Ruling," filed by Lauren A. Colby, Esq., on March 2, 1994. In support whereof, the following is shown:

1. Mr. Colby's Petition addresses important issues concerning the Commission's recent "freeze" on comparative hearings and the filing of applications for new FM stations, as outlined in its Public Notice, FCC 94-41, released February 25, 1994. S&B also represents numerous clients that will be affected by the Commission's action. S&B supports Mr. Colby's Petition and hopes that the Commission will take this opportunity to more clearly explain its proposed freeze and what proceedings and/or filings it will affect.

2. In addition, S&B believes that there are two other areas that the Commission's Public Notice did not clearly address. First, in one paragraph of the Public Notice, the Commission states that "...hearing proceedings (except those aspects of hearing proceedings not involving comparative analysis of new applicant's proposals) will be suspended." Public Notice at p. 1 (emphasis added). This would

appear to say that parties in a comparative hearing are free to pursue basic qualifying issues against other applicants and that such issues may continue to be litigated. In fact, the Commission states that, where an issue has been added or a case remanded on a basic issue, the proceeding will be permitted to go forward. Public Notice at p. 2. However, the Public Notice does not address the situation where a qualifying issue was not added or requested prior to February 25, 1994. The question remains whether, during the freeze, parties are required to file Motions To Enlarge Issues based upon "newly-discovered evidence" within the 15 day deadline specified in §1.229(c) of the rules or whether such deadlines have been stayed until the freeze is lifted. Additionally, the Public Notice does not address whether a party who is the subject of a Motion To Enlarge raising basic qualifying issues that was filed before the Commission's freezes, is required to submit its Opposition and the Movants Reply by the deadline outlined in §1.294 of the rules, or whether such deadlines are also stayed.

3. In addition, the Commission's Public Notice states that during the freeze the Mass Media Bureau will not "issue cutoff lists or...require the filing of....hearing fees." Public Notice at p. 2. However, the Public Notice does not explain whether those parties with applications that appeared on a cutoff list issued before the freeze who are facing an upcoming hearing fee payment deadline are required to make the hearing fee payment or whether the freeze has stayed this requirement.

4. Should the Commission choose to consider Mr. Colby's Petition, S&B believes it should also quickly address these other important questions.

WHEREFORE, the above-premises considered, the law firm of Smithwick & Belendiuk, P.C., hereby respectfully requests that the Commission issue a Declaratory Ruling concerning its Public Notice, FCC 94-41, as outlined herein.

Respectfully submitted,

SMITHWICK & BELENDIUK, P.C.



By: _____

Gary S. Smithwick
Arthur V. Belendiuk
Shawn A. Maher

SMITHWICK & BELENDIUK, P.C.

1990 M Street, N.W.

Suite 510

Washington, DC 20036

(202) 785-2800

March 2, 1994

PN/GSS/FREEZE.COM

CERTIFICATE OF SERVICE

I, Patricia A. Neil, a secretary in the law firm of Smithwick, & Belendiuk, P.C., certify that on this 2nd day of March, 1994, copies of the foregoing were sent by first class mail, postage prepaid, to the following:

Lauren A. Colby, Esq.
10 E. Fourth Street
P.O. Box 113
Frederick, MD 21705-0113



Patricia A. Neil